IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1940.

No. 350

ALBERT H. LIEBERMAN, EMIL COHN, JR., and GEORGE F. McCANN, Ancillary Receivers of CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a Corporation,

Petitioners,

against

CITY OF PHILADELPHIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANCIS F. BURCH,
City Solicitor,

SAMUEL FELDMAN,
ABRAHAM WERNICK,
Assistant City Solicitors,
Counsel for Respondent.

7th Floor, City Hall Annex,
Philadelphia, Pa.

Martin & Lyle, 302 Penfield Bldg., Phila., Pen. 0665, Keystn. Race 6067.

INDEX.

CASES CITED.

CASES CITED (Continued).

OTHER AUTHORITIES.

JURISDICTION.

The petitioners' theory that this Court has jurisdiction of the instant case is based upon their presumption that a conflict exists between the decision rendered in the instant case by the Third Circuit and that of this Court in **Clark v. Williard, 292 U. S. 112, 78 L. Ed. 1160, 54 Sup. Ct. Rep. 615 (1934)**, and of the Fifth Circuit in **National Surety Company of New York v. Cobb, 66 F. (2d) 323 (1933)**. If, therefore, upon analysis of those cases it be demonstrated that there is in fact no material variance in the principles of law enunciated in each of them the petition for a writ of certiorari filed herein will be found to be devoid of the requisite grounds for the assumption of jurisdiction by this Court and should therefore be dismissed.

The decision in **Clark v. Williard**, supra, does not sustain the contention advanced by the petitioners to the effect that after the dissolution of the Consolidated Indemnity and Insurance Company no relief can be obtained by the City of Philadelphia against the securities deposited by that company with the Broad Street Trust Company. Mr. Justice Cardozo in the course of the opinion in that case, said, (p. 120): "In such circumstances the judgment is at least effectual to liquidate the claim as a charge upon the local assets". That statement of law supports the respondent's contention that apart from the right to proceed *in personam* against the dissolved corporation, a creditor may nevertheless proceed *in rem* against any property of that corporation which had been deposited in the jurisdiction wherein the proceedings are instituted. And that is the principle which the Circuit Court of Appeals for the Third Circuit invoked in sustaining the respondent's contention in the instant case.

Section 2 of the General Corporation Laws of the State of New York discussed in the opinion of the Court

in **National Surety Company of N. Y. v. Cobb**, supra, (p. 34) provides that stock corporations shall be "(1) a money corporation". Section 3 of the same General Laws defines a money corporation in the following terms: "A money corporation is a corporation formed under and subject to the banking law or the *insurance* law". (Italics supplied)

Circuit Judge Hutcheson, after reviewing that language, said (p. 325):

> "Assuming that Section 29 does have the effect of continuing the life of corporations for purpose of suit, though this is questionable, * * *, for this statute, unlike that existing before 1929 and restored by the amendment of 1932, does not provide in terms that upon the dissolution of a corporation * * * its corporate existence shall continue for the purpose of paying existing obligations and it may sue and be sued in its corporate name * * *".

Since the decree of dissolution in the Cobb Case was entered in 1930, it obviously was controlled by the 1929 Act, which did not have the same provision regarding the continuance of the corporation for the purpose of suit as did the earlier Act prior to 1929, and which was restored by the amendment of 1932. *In view of the fact that the dissolution of the Consolidated Company occurred in May of 1934, it would necessarily be controlled by the amendment of 1932, the express purport of which is to continue the life of the corporation for the purpose of suit.*

The effect of the decision of the Third Circuit in the instant case is that the respondent will be required to apply to the District Court for leave to prosecute such actions against the securities deposited with the Broad Street Trust Company as may be necessary to protect its rights in the premises and that upon such application it would be the duty of the District Court to grant such

leave. Clearly that conclusion is in no wise in conflict with the decision of this Court in **Clark v. Williard,** or of the Fifth Circuit in **National Surety Company v. Cobb.**

Even though a corporation may not be sued *in personam,* after its dissolution, the law permits a proceeding *in rem* against the property of such corporation in a foreign jurisdiction in order to utilize such property in satisfaction of the obligation where the property was deposited for the specific purpose of paying such claims while the corporation was solvent: **14A C. J. p. 1351.**

It is rather significant that the petitioners permitted an equity proceeding to be instituted against them in the Court of Common Pleas No. 4 of Philadelphia County, as of December Term, 1935, No. 2064 and judgment to be entered against them therein on November 4, 1937 in favor of the TREVOSE CONSTRUCTION COMPANY. Reference to this case was made by the petitioners on page 14 of their brief filed in the Circuit Court of Appeals. On page 47 of the Record, reference is made to the judgment entered against the petitioners on October 4, 1935 in favor of the TREVOSE CONSTRUCTION COMPANY in the Court of Common Pleas No. 3 of Philadelphia County, as of June Term, 1932, No. 13471. Since the Consolidated Indemnity and Insurance Company was dissolved on May 24, 1934, it is difficult to understand why the petitioners permitted the entry of those judgments against them if their contention now made that no judgment can be entered against a dissolved corporation be sound.

Moreover, it is extremely doubtful whether the petitioners, who are ancillary receivers of the Consolidated Indemnity and Insurance Company, have the right to file a petition for a writ of certiorari without first having obtained leave so to do from the District Court: **53 C. J. p. 316; 3 C. J. p. 654.**

Hence respondent respectfully submits that the petition for a writ of certiorari in the instant case should be dismissed.

SUMMARY STATEMENT OF MATTER INVOLVED.

This case involves the rights of the City of Philadelphia under a certain agreement dated November 30, 1929 (R. pp. 11-15) between the Consolidated Indemnity and Insurance Company, a New York Corporation, the Broad Street Trust Company and the said City, and also under a second agreement dated June 14, 1934 entered into between the petitioners, the ancillary receivers of the Consolidated Indemnity and Insurance Company and the City of Philadelphia, the latter agreement having been approved by the United States District Court (R. pp. 17, 21-24, 35).

Under the first of said agreements the securities of the value of One Hundred Thousand Dollars ($100,000) deposited with the Broad Street Trust Company were not to be surrendered to the Consolidated Indemnity and Insurance Company until the City Solicitor of the City of Philadelphia would consent in writing to do so; and that official was not to give his consent until such time as the City of Philadelphia held no outstanding obligations of the Consolidated Company.

The petitioners were appointed ancillary receivers of the Consolidated Indemnity and Insurance Company by the District Court of the United States for the Eastern District of Pennsylvania on May 11, 1934. At that time the New York Courts had not yet decreed a dissolution of the Consolidated Indemnity and Insurance Company. Shortly after their appointment as ancillary receivers, to wit, on May 18, 1934 the petitioners filed in the District Court a petition for a rule to show cause why the Broad Street Trust Company should not be ordered to surrender to them the above named securities. To that petition the City filed preliminary objections challenging the right of the District Court to grant such relief (R. pp. 20, 44, 45). When the District Court indicated to the petitioners that in its opinion the position of the respondent was sound (R. pp. 44, 45), the petitioners took no further action with respect to those securities until November 17, 1937, when

the present equity proceedings were instituted. The petitioners sought through those proceedings to secure information regarding the outstanding obligations of the Consolidated Company so as to enable them to make proper adjustments thereof (R. p. 7), and in paragraph 13 of the Bill stated that the Broad Street Trust Company and the City of Philadelphia are holding in trust for the petitioners only so many of the securities as remain after the deduction of not presently matured obligations but also any contingent obligations which may hereafter be liquidated. The prayers of the Bill were that the City be ordered to file an accounting of all outstanding claims it may have against any principals for whom Consolidated was surety, *including contingent liabilities, and to return only such securities in excess of judgments already entered, and contingent liabilities.*

In his report the Special Master appointed to hear testimony found that the City of Philadelphia held no final judgment recovered in its favor against the Consolidated Company, and that no such final judgment could be recovered without special leave of Court (R. p. 199). He also found that the City of Philadelphia held outstanding obligations to the extent of $1,839.11, representing money expended in repairing defective work performed under certain contracts upon which the Consolidated Company was surety; and also in the sum of $7,007.05 being the total amount of damages claimed in two suits that were pending against the City, and as to which the Special Master said, "Should the suits be proceeded to trial and final judgment, the Consolidated Company as surety would be liable to the City" (R. p. 199).

The Special Master further held that all other of the outstanding obligations imputed to the Consolidated Company are non-existent and hypothetical and therefore recommended that an order be entered directing the Broad Street Trust Company to turn over to the ancillary receivers forthwith all the securities deposited with it on November 30, 1929.

The District Court dismissed the respondent's exceptions to the Master's report without filing an opinion. On appeal to the Circuit Court of Appeals for the Third Circuit the order of the lower Court was reversed. Some time thereafter on petition of the petitioners a re-argument was granted at which the petitioners and others as amici curiae were heard. Subsequently the Court filed a supplemental opinion affirming its former decision; both opinions are reported in **112 F. (2d) 424.**

ARGUMENT.

1. On page 13 of the petition a number of decisions are cited purporting to support the contention that in case of insolvency pledged property must be surrendered to the receiver of the pledgor where the holder or beneficiary of the pledged property is without the means, power or machinery for carrying out the terms or purposes of the pledge. In the briefs filed in the Circuit Court of Appeals the petitioners cited the same decisions in support of their contention then made, to the effect that the pledged property must be surrendered to the receiver of the pledgor where there is a dry trust.

The respondent in response to the latter contention established the fact that the trust in the instant case is not a dry but an active one. An examination of paragraph 4 of the agreement of November 30, 1929 aforesaid under which the securities were deposited discloses a provision to the effect that all interest and dividends accruing from the securities shall be paid to the Consolidated Company. That clearly involves active duties of collecting interest, maintaining records therefor and paying same to the parties entitled thereto. And paragraph 6 of that agreement provides that if a judgment against the Consolidated Company in favor of the City be not paid after sixty days' notice, the Broad Street Trust Company shall sell and

transfer so many of the securities as may be required to pay said judgment, with costs and interest; that provision also imposes active duties: **Barnett's Appeal, 46 Pa. St. 392, 399; Dodson v. Ball, 60 Pa. St. 492, 496; Hemphill's Estate, 180 Pa. St. 95, 36 Atl. 409; Simmonin's Estate, 260 Pa. St. 395, 397, 103 Atl. 927; Bierne v. Cont. Eq. T. & Tr. Co., 307 Pa. St. 570, 576, 161 Atl. 721.**

With further reference to the citations appearing on page 13 of the petition, it is respectfully submitted that one group thereof involved a situation where a state statute providing for the deposit of securities with a state officer for the protection of policy holders, contains a specific provision that when a receiver is appointed at the instance of policy holders the state officer shall turn over to such receiver the securities so held by him. Typical of that group is **Morrill v. American Reserve Bond Company, 151 F. 305 (C. C. W. D. Missouri, 1907).** In that case a statute of Missouri provided that when a receiver is appointed the state treasurer shall be required to surrender the securities to such receiver upon order of the Court.

A similar situation existed in **Hobbs v. Occidental Life Insurance Company, 87 F. (2d) 380 (C. C. A. 10, 1937),** wherein the decision was based on a specific wording of the Kansas statute.

A second group of those citations involved a situation *where the application for the appointment of a receiver was made by the policy holders for whose specific benefit the securities had been deposited with the state officer,* and when an effort was made to have the state officer surrender the securities to the receiver, the only objection thereto was made by such state officer. The Court in those cases held that since the receiver represents the policy holders and the fund was deposited specifically for their benefit the state officer was in no position to object to their surrender since he represented no pecuniary interest therein. Typical of this group of cases is **Holloway v. Federal Reserve Life Insurance Company, 21 F. Supp. 516 (D. C. W. D. Missouri, 1937).**

In the instant case the securities were deposited with the Broad Street Trust Company for the specific benefit of the City of Philadelphia, the respondent herein. The application for the appointment of the ancillary receivers was not made by or at the instance of the said City but at the instance of parties and persons who can have no interest in those securities until after the respondent has been fully safeguarded and indemnified from the proceeds thereof. *Moreover, it is the beneficiary of those securities, i. e., the City of Philadelphia, which is opposing their surrender to the ancillary receivers rather than requesting or advocating such action; whereas in the cases cited by the petitioners referred to, the only party opposing the surrender of the securities was the stakeholder, namely, the state officer, who admittedly had no interest whatever therein.*

A third group from the cases cited by the petitioners involved a situation where the state treasurer had surrendered to the receiver the securities deposited with him by the insolvent company, and a third party had intervened and opposed such surrender. In those cases the Court expressly held that such third party was in no position to complain. Typical of this group is **Hopkins v. Lancaster, 254 F. 190, 192 (D. C. N. D. Ala. 1918).**

Thus it is manifest that: (a) the citations appearing on page 13 of the petition filed herein do not sustain the contention made that pledged property must be surrendered to a receiver of the pledgor where a pledge holder has not the means, power or machinery of carrying out the terms or purposes of the pledge; and (b) the facts of those cases are not similar to, but on the contrary are clearly distinguishable from those of the instant case.

2. Petitioners contend that there is a conflict between the decision of the Third Circuit in the instant case and the decision of this Court in **Clark v. Williard**, supra, as well as the decision of the Fifth Circuit in the case of **National Surety Company of N. Y. v. Cobb**, supra. This

contention has already been answered by the respondent under the title "JURISDICTION", of this opposing brief.

On page 15 of the petition there is cited **Burns v. Niagara Life Insurance Company, 279 Pa. St. 453, 124 Atl. 128 (1924).** We submit that in that case the Supreme Court of Pennsylvania merely adopted the law of New York, that such corporation could not be sued *in personam* after its dissolution for the purpose of having judgment entered against it in Pennsylvania. The question involved in the instant case, however, is whether proceedings *in rem* may be instituted by the respondent for the purpose of proceeding against the securities deposited with the Broad Street Trust Company in this jurisdiction, in order to utilize the securities in satisfaction of obligations due to the respondent.

3. Petitioners complain that the Circuit Court of Appeals in this case held that upon proper application by the respondent the District Court could grant respondent leave to proceed against these securities in an appropriate tribunal. Such procedure is legal and proper as **Meehan v. Connell Anthracite Mining Company, 318 Pa. St. 481, 178 Atl. 833 (1935)** cited by the Circuit Court clearly establishes. Moreover, it is to be noted that proceedings were instituted and pursued to judgment against the Consolidated Company both in the Court of Common Pleas No. 3 and in the Court of Common Pleas No. 4 of Philadelphia County, long after the dissolution of the Consolidated Company by the State of New York as was more fully related hereinabove.

4. Petitioners complain that the Circuit Court of Appeals in holding that there are outstanding obligations of the Consolidated Company, introduced a "startling innovation into the law of building contracts and commercial surety, one not directly supported by any previous authority". It is to be noted that the petitioners for the first time in these proceedings advanced the contention in the

Circuit Court of Appeals that there were no outstanding obligations of the Consolidated Company in favor of the City, for the reason that the City would have no right to sue that company because of any judgments entered against the City arising out of damages which occurred after the work was finished by the contractor. In their petition to this Court they now repeat the same contention. An examination of the report of the Special Master filed herein fails to disclose the fact that he had made any reference whatsoever to such contention, and moreover made a finding against the basis for such contention. On page 199 of the Record the Special Master refers to two suits which had been instituted against the City for damages totaling $7,007.05, and said:

> "Should the suits be proceeded with to trial and final judgment, the Consolidated Company, as surety, would be liable to the City."

This is a specific finding that the City could hold the Consolidated Company responsible for both cases. One of those cases, (R. p. 123), was that of **Albert S. Siebner v. City of Phila. and Henry W. Horst Co., Additional Defendant,** instituted in the Municipal Court, as of August 1936, No. 334 for $1,007.03. An examination of the pleadings in that case discloses that suit was instituted on August 11, 1936 and damages claimed because on April 3, 1936 the plaintiff had been compelled to excavate and rip out the improperly installed drain pipe, and to install a new drain pipe in its place at a cost of $1,007.03. The statement of claim further averred that from April 15, 1932, and thereafter, water and sewage which should have been discharged through the drain pipe into the sewage pipe, backed up into the property of the plaintiff. The writ of Sci. Fa. filed by the City to join in the contractor, Henry W. Horst Co., as additional defendant, averred that the work in constructing the Locust Street Subway by said contractor which caused this condition, was com-

pleted on December 17, 1931 and the answer of the contractor admits it.

Here then, is a case where the damages occurred long after the work had been completed and accepted by the City of Philadelphia, and the Special Master found that the Consolidated Company would be responsible to the City for any judgment entered against it for damage arising from said work. This certainly militates against the contention of the petitioners raised for the first time in the Circuit Court of Appeals that the indemnity clause in the various contracts upon which the Consolidated Company was surety must be limited to cover only damages that occur before the work of the contractor is finished. To adopt such a contention would result in eliminating entirely the express provisions of that portion of the indemnity clause quoted in the opinion of Judge Maris. It is manifest that some meaning and effect must be given to the word "further", appearing in the second portion of the indemnity clause, as well as to the words "during the progress of the work", which limits the words "prosecution of the work" contained in the second portion of the indemnity clause, but not in the first portion.

The City does not agree with the argument of the petitioners that the contractor does not remain responsible to the City after the work is accepted. On the contrary, it is contended that the law is otherwise, for in the very cases cited by the petitioners it was held that even though the contractor may not be sued by the injured third party after the work is accepted by the City, nevertheless the City may sue the contractor. Thus in **Presbyterian Congregation v. Smith, 163 Pa. St. 561, 577, 30 Atl. 279**, the Court said:

> ". . . *Now, the contractor may be liable on his contract to the city for his negligence,* but he is not liable to the traveller; . . . because, between the traveller and the contractor intervened the City, an indepen-

dent responsible agent, breaking the causal connection". (Italics suplied)

In **Cunningham v. Gillespie, 241 Mass. 280, 135 N. E. 105**, the Court said:

". . . The defendant, of course, remained bound to the Boston Transit Commission according to the terms of his contract".

Likewise in the case of **Ford v. Sturgis, 14 F. (2d) 253, 254**, the rule is stated as follows:

". . . The liability of the builder or contractor for defective construction is to the person with whom he was under contractual relations, and a stranger can hold him liable after he has parted with possession only under exceptional circumstances. . . . 65 L. R. A. 620".

There have been cases where it was held that even though the City supervised the work, the contractor would be responsible to the injured third party: **Erie v. Caulkins, 85 Pa. St. 247, 27 Atl. 642**, cited with approval in **Baier et ux v. Glen Alden Coal Co., 131 Pa. Super. Court 309, 320, 200 Atl. 190.**

Again there are cases where the City has been held responsible, typical of which is **Harvey v. Chester, 211 Pa. St. 563, 61 Atl. 118**, although it was recognized that the contractor also remained responsible if the contractor was negligent where he was under duty to keep the subject of the contract in proper repair for any length of time subsequent to the completion of the work.

Hence, while it has been held that under certain circumstances the contractor is not responsible to an injured third party after the work has been accepted, even though there are authorities to the contrary, nevertheless the principle of law that the contractor is still responsible to the

owner or the municipality for whom the work was done for any damage caused by reason of the negligent manner in which the work was performed, is universally recognized.

It is to be noted that those cases do not concern themselves with situations similar to those prevailing herein, in that the contracts do not include a provision which is expressly contained in those involved in the instant case, to the effect that the contractor shall indemnify and save harmless the owner or municipality from any damage or loss that may be sustained by reason of the work performed by the contractor.

Respondent respectfully urges that the supervision of the work by its engineer may render the City responsible to a third party for any negligent work done by the contractor jointly with the contractor, on the theory that the failure of the City's engineer to properly supervise the work concurs with the negligent manner in which the contractor did the work which resulted in damage to the third party: **14 R. C. L. 84.**

Applying that principle to a state of facts as in the instant case it would make no difference whether the defects in construction were *latent* or *patent*, for where injury occurs by reason of the negligent manner in which the work was done by the contractor, even though the defects may be latent and were not discovered by the City engineer by reason of any omission or commission on his part, then both the City and contractor would be jointly responsible.

In fact that principle of law receives support from the English Case cited by the petitioners on p. 17 of their petition, namely, **Ilford Gas Co. v. Ilford Urban District Council and Jackson, 3rd party, LXVII, the Justice of the Peace, p. 365 (Court of Appeals, 1903).** There the jury found that the injury complained of was due to the *nature* of the work of the contractor and was not due to the *mode* in which the work was executed. Law Judge Sterling said

that since the jury found that the contractor in all respects properly performed his work and since the accident to the pipe of the plaintiff gas company occurred not from any improper acts of the contractor but only by reason of the nature of the work, and since the indemnity clause gives the District Council only a right to be indemnified against damage or injury arising or occasioned by the negligence, default or misconduct of the contractor, from or by the execution of the work, therefore, the District Council had no right to call upon the contractor for indemnity. *But nowhere in that case was it decided that the only time that the District Council may call on the contractor for indemnity is where the damage occurs during the progress of the work.*

The fact that although similar indemnity provisions have been included in the City's contracts for many years, and no contractor or indemnity company has ever argued that the City can only be indemnified for damage occurring during the progress of the work, is the most persuasive proof that no such construction or interpretation was ever intended.

The Court's attention might also be invited to a certain contract dated October 26, 1931 for roofing at the 11th District Police Station, which contract included a fifteen year guarantee (R. p. 113), and, while up to the present time, no claim has been made thereon, nevertheless under the term "outstanding obligation", that guarantee would manifestly be included.

Petitioners' argument that the indemnity clauses contained in the building contracts between the contractors and the City do not make the contractors liable for the City's own negligence is neither disputed nor involved in the present controversy, as the City does not contend that the contractors would be responsible for any damages caused by reason of the City's *sole* negligence. We do, however, submit that since the City may be held responsible for any damage caused by reason of the negligence of the contractors, under indemnity clauses contained in the City contracts, it has a right to seek indemnification

from the securities deposited with the Broad Street Trust Company.

Petitioners cite the case of **Flynn v. Philadelphia, 199 Pa. St. 476, 49 Atl. 249.** An examination of that case will disclose the fact that while the City in defending a suit by the contractor for the balance of the contract price asserted the right to withhold portions thereof, until certain claims against the City would be disposed of, the referee in that case found as a fact that although the damage arose as a result of the work done by the contractors, it was not by reason of any negligence on the part of the contractors in the performance of the work. For that reason it was held that the contractors could not be liable for injuries to the adjoining properties in the absence of proof of their failure to exercise proper care and skill in the prosecution of their work within the lines of the right of way which occasioned the damages which the City would otherwise have not been required to pay.

It may be of interest to observe that the brief of the appellee in the Flynn case (page 5), admits that *if the contractor were negligent in improperly doing the work that it might render the City liable even though the contractor was independent, and in such case the City would have a right to retain the money due him.*

It should further be noted that the indemnity provisions of the contracts involved in the instant case are much broader and entirely different from the indemnity provision of the contract involved in the Flynn case.

The other two cases of **Morton v. Traction Co., 20 Pa. Superior Court 325, and Perry v. Payne, 217 Pa. St. 252, 66 Atl. 553,** do not involve contracts with municipalities, nor indemnity provisions of the same nature and character as those in the instant case, and hence can be of no aid in the determination of the questions involved in the instant case.

The petitioners' contention that since a third party cannot hold the contractor responsible after the accept-

ance of the work, neither can the City hold the contracto responsible under the indemnity clause, is entirely witho merit. In the case of **Erie v. Caulkins**, supra, the contra provided that the contractor was acting independentl and that the work should be done under the supervisio of the City engineer. Mr. Justice Gordon in the cour of the opinion said (pp. 253, 254):

> ". . . This contract contemplates the accomplis ment of a certain result; the means, so far as th are deemed necessary to give the work its prop character, are carefully specified; the province of t engineer was to see that these means were proper applied, in other words, to see that proper materia and methods were used to produce the required resu But in all this the contractor was supreme, for he h but to comply with his contract in delivering to t city a good job according to the terms of that co tract. In doing this he was his own master; the ci could not direct where he should get his materi how he should bring it upon the ground or how ma men he should employ. The city could not fill up t trenches which he dug in the ground designated f the sewer, neither could it erect barricades which might not tear down if they obstructed his work; was in the lawful possession of that part of the str which was necessary for the fulfillment of his und taking, and the city could not dispossess him. think, therefore, the principle of master and serva is not to be discovered in the contract between th parties, and that the defendant is not within the r stated by Mr. Justice Agnew, in Allen v. Willard, P. F. Smith 374, that the liability of the employer the contractor continues where he has not relinquish his control over the work to be done.
>
> "Again, it is scarcely open to question, but t Grant himself was responsible for the negligence

those whom he employed about this work. He could not plead that he was but an agent, and that as such he employed the workmen, for in this matter, at least, the city could not control him. These were his own servants who must look to him for their pay and direction; they had no claims against the city and could hold it responsible for nothing; even were they negligent and unskillful they could bid the city defiance until Grant chose to discharge them. If so, then, beyond controversy, Grant was, to these employees, the responsible superior and there could be no other. As was said in Wray v. Evans, there cannot be two superiors severally liable for the acts of subordinate agents. This case, therefore, necessarily drops into that class of cases represented by Painter v. The Mayor, 10 Wright 213; Hunt v. The Pennsylvania Railroad Co., 1 P. F. Smith, 475; Allen v. Willard, 7 Id. 374; and Reed v. The City, 29 Id. 300. In several of these cases this whole subject has been very carefully elaborated, and we need not, therefore, undertake to re-discuss the matter".

Petitioners argue that for any jeopardy respondent might have as a result of accidents occurring *during* construction, the **Penna. Act of July 1, 1937, P. L. 2547, 53 P. S. Sec. 2774**, would seem to afford respondent adequate protection.

The Circuit Court of Appeals conclusively answered that contention, holding that the date of origin of such claim necessarily means the date when the injury or damage is caused, and the six months provided in that statute would run from that date: **(112 Fed. (2d) 428)**.

We respectfully submit that the basic question involved in this case and one of vital import to the City of Philadelphia, is whether a contract entered into with a solvent corporation may subsequently be repudiated by ancillary receivers appointed upon the insolvency of that

corporation, even though that agreement (as in the instant case) has been expressly ratified and re-affirmed by a subsequent agreement executed by those very ancillary receivers. The inevitable answer is that such an agreement is just as sacred against attack by ancillary receivers as it is by the original contracting parties themselves or by the State wherein the contract was made since it has been universally established that receivers always take the assets *cum onere:*

Clark on Receivers, 2nd Ed., Vol. 1, p. 942;
Ruggles v. Chapman, 1 Hun. 324, 8 Supreme Ct. Reports N. Y. 324;
Ruggles v. Chapman, 14 Sickels 626, 59 N. Y. 164;
Ruggles v. Chapman, 64 N. Y. 557;
In Re Home Provident S. F. Ass'n., 129 N. Y. 288, 29 N. E. 323;
Risk v. Kansas Trust and Banking Co., 58 Fed. 45;
Vandiver v. Poe, 119 Md. 348, 87 Atl. 410;
Brackett v. Middlesex Banking Co., 89 Conn. 645, 95 Atl. 12;
Austin-Nichols & Co. v. Union Trust Co., 289 Pa. St. 341, 137 Atl. 461;
Wyoming Construction Co. v. Franklin Trust Co., 298 Pa. St. 582, 148 Atl. 902;
Greenbaum v. Hotel Co., 38 Fed. (2d) 96 (W. D. Pa.);
Galey v. Guffey, 248 Pa. St. 523, 94 Atl. 238;
Mortgage Bldg. and Loan Case, 334 Pa. St. 81, 5 Atl. (2d) 342;
Philadelphia Trust Company v. Northumberland County Traction Co., 258 Pa. St. 152, 172, 101 Atl. 970;
Bunn v. Gorgas, 41 Pa. St. 441;
Penrose v. Erie Canal Co., 56 Pa. St. 46;
Breitenbach v. Bush, 44 Pa. St. 313;
Billmeyer v. Evans, et al., 40 Pa. St. 324;
Weist v. Wuller, 210 Pa. St. 143, 59 Atl. 820;

The Columbia & Montour Electric Company v. The North Branch Transit Company, 258 Pa. St. 447, 102 Atl. 214;
Hunt v. Thomas, 3 Phila. 121;
Beaver Co. B. & L. Assn. v. Winowich, 323 Pa. St. 483; 187 Atl. 481.

It is a fundamental principle of law that the rights of a receiver cannot rise higher than those of the debtor of a judgment creditor.

Deere Plow Co. v. Hershey, 287 Pa. St. 92, 134 Atl. 490;
Blum Bros. v. Burk, 248 Pa. St. 148, 93 Atl. 940;
Frowert v. Blank, 205 Pa. St. 299, 54 Atl. 1000;
Risk v. Kansas Trust & Banking Co., 58 Fed. Rep. 45;
Greenbaum v. General Forbes Hotel Co., 38 Fed. Rep. (2d) 96 (W. D. Pa.);
Fidelity Insurance Trust & Safe Deposit Co. v. Roanoke Iron Co., 81 Fed. Rep. 439.

Where a pledge is made in good faith the pledgee is entitled to the possession of the pledged property as against the receiver of the pledgor and to enforce his security in accordance with the contract under which he holds.

Sturzinger v. Hart, 22 Fed. (2d) 801;
In Re Binghampton Gen. Elec. Co., 143 N. Y. 261;
Rogers Brown & Co. v. Tendel Morris Co., 271 Fed. 475 (D. C. E. D. Pa.);
In Re Dissolution of Home Provident S. F. Ass'n., 129 N. Y. 288, 29 N. E. Rep. 323;
High on Receivers, Sect. 359.

The dissolution or insolvency of the company and the appointment of a receiver do not affect a guaranty fund or a trust fund created by the company for the protection

of policyholders, and the court has no power to order the trustees to pay over the trust fund to the receiver, unless the trust agreement authorizes it: **32 C. J. p. 1050.**

Since the contracts of November 30, 1929 and June 14, 1934 hereinabove referred to provide that the securities should not be returned unless the City Solicitor gives his written consent, and that such consent shall not be given as long as there are outstanding obligations of the Consolidated Company, it is respectfully submitted that the petitioners could not disturb that trust agreement any more than could the Consolidated Company itself, for the obvious reason that the City Solicitor has not given his written consent, and because he would have no authority to give such consent in view of the fact that there are outstanding obligations of the Consolidated Company. And indeed, before the Special Master, the attorneys for the petitioners admitted that if there were outstanding obligations they are not entitled to relief (R. p. 46).

Moreover, the term "outstanding obligations" was interpreted by the attorneys for the petitioners before the Special Master as follows, (R. p. 63):

> "MR. ROSEN: Well, I understand by outstanding obligations any contract or bond that this surety Company gave to the City of Philadelphia in connection with work, furnishing of materials, etc. which has not expired by reason of the statute of limitations".

The term "outstanding obligation" has been construed to be an obligation that is "unsettled", "uncollected", or otherwise "undetermined", as for instance, an outstanding contract.

> **New York Trust Co. v. Portland Railway Company, 197 N. Y. Appellate Div. 422, 428 (1921).**

The Special Master, without the citation of any auth-

orities, refers to the outstanding obligations as "non-existent and hypothetical" (R. p. 199); but it is respectfully submitted that the possibilities and probabilities of suits being instituted against the City of Philadelphia are real and actual. The record discloses (R. p. 165) that the outstanding surety bonds of the Consolidated Indemnity and Insurance Company, upon which claims for property damages may still be made against the City of Philadelphia, aggregate in amount Two Hundred and Nine Thousand Dollars, ($209,000), where the Consolidated Indemnity and Insurance Company was sole surety; and Five Million One Hundred Two Thousand Five Hundred Dollars, ($5,102,500) where the Consolidated Company was co-surety.

It does not lie in the mouths of the petitioners to say that the work performed by a contractor, the Keystone State Corporation, for instance, in the construction of the City Hall Concourse, known as Step No. 2 (R. p. 165), may not by reason of some negligent construction or defective material cause property damage to various parties or persons by the settling, cracking, and even collapse of buildings, walls or other structures, the result of which would involve damages aggregating in amount many times the value of the securities deposited by the Consolidated Company and its co-sureties on such contract, as well as the aggregate amounts of principal of the surety bonds given to the City of Philadelphia in connection with such contract.

The City is vitally interested in knowing whether it receives proper protection, when in pursuance to the provisions of an ordinance it requires foreign corporations, before permitting them to act as sureties on municipal contracts, to deposit One Hundred Thousand Dollars ($100,000) worth of securities, which shall be utilized only for its benefit. *The purpose of depositing such security is to safeguard against the very contingency which has occurred in this case, namely, the insolvency of the surety.* Furthermore, the agreement of deposit provides that the se-

curity shall not be surrendered unless other securities of equal or greater value are substituted and delivered to the Broad Street Trust Company by the Consolidated Company. If the contention of the petitioners should be sustained, it would mean that the City receives no protection whatever from its agreement against the insolvency of a foreign surety.

The Consolidated Company received substantial premiums for the execution and delivery of its various bonds, the amount of said premiums being reflected in the bids submitted by the contractors to the City and ultimately paid by the City as part of the contract price; and manifestly one of the reasons for the payment of those premiums was that the obligations imposed upon the Consolidated Company shall remain in force and effect until the City shall be relieved from any hazard of suit and actions at law.

We submit that the effect of the decision of the Circuit Court of Appeals is to uphold the sanctity and validity of the agreements of November 30, 1929 and June 14, 1934 and to give to the City the protection which the agreement was intended to afford it. Hence it is respectfully urged that said decision should not be disturbed and the petition for certiorari be dismissed.

Respectfully submitted,

FRANCIS F. BURCH,
City Solicitor,

SAMUEL FELDMAN,
ABRAHAM WERNICK,
Assistant City Solicitors,
Counsel for Respondent.

7th Floor, City Hall Annex,
Philadelphia, Pa.